

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SYLVIA STONER,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendants.

Case No. C19-5067 TLF

ORDER REMANDING FOR A NEW  
HEARING

This matter comes before the Court on plaintiff's motion to amend or alter the judgment under Federal Rule of Civil Procedure 59(e). Dkt. 15. Having carefully considered the arguments, and balance of the record, the Court finds that plaintiff has met its burden of showing a clear error of law as to the Court's decision concerning plaintiff's treatment and consistency with the medical opinion of Dr. Gritzka, M.D. Dkt. 13, Order Affirming Defendant's Decision to Deny Benefits, at 10-11. The Court holds the ALJ erred by rejecting the opinions of plaintiff's treating physician, Dr. Gritzka, when evaluating her RFC.

BACKGROUND

The ALJ rejected Dr. Gritzka's opinion for the following reasons: (1) inconsistency with plaintiff's history of conservative pain treatment and improvement through physical therapy; (2) inconsistency with plaintiff's functioning, as shown by her daily activities; (3) internal inconsistency; and (4) lack of objectivity due to plaintiff's

1 reason for examination. Dkt. 8, Administrative Record (“AR”), at 26. In the Order  
2 Affirming Defendant’s Decision to Deny Benefits, the Court found the ALJ had provided  
3 a specific and legitimate reason to discount Dr. Gritzka’s opinion, due to plaintiff’s  
4 conservative treatment regime. Dkt. 13 at 10-11. The Court found that plaintiff’s regular  
5 use of over-the-counter pain medication and occasional use of Vicodin constituted  
6 conservative treatment for her musculoskeletal impairments and is inconsistent with Dr.  
7 Gritzka’s opinion that plaintiff could not perform sedentary work. *Id.* at 11, citing (*Jesus*  
8 *C. v. Berryhill*, No. ED CV 17-2103-PJW, 2018 WL 5984839, at \*2 (C.D. Cal. Nov. 13,  
9 2018) (unpublished) (finding treatment was properly characterized as conservative  
10 where plaintiff was prescribed Oxycodone for two of 27 months during relevant period).

#### 11 ANALYSIS

12 The Court may alter or amend a judgment under Rule 59(e) where the Court has  
13 committed clear error. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Rule  
14 59(e) provides an “extraordinary remedy, to be used sparingly in the interests of finality  
15 and conservation of judicial resources.” *Id.* (citation and internal quotation marks  
16 omitted).

17 The Court must consider the administrative record as a whole. *Garrison v.*  
18 *Colvin*, 759 F.3d 995, 1009-10 (9th Cir. 2014). The Court gives great deference to the  
19 opinion of a treating physician because he or she is “employed to cure and has a  
20 greater opportunity to know and observe the patient as an individual.” *Morgan v.*  
21 *Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) (internal quotation  
22 omitted). To reject the uncontradicted opinion of either a treating or examining  
23 physician, an ALJ must provide clear and convincing reasons. *Revels v. Berryhill*, 874  
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1 F.3d 648, 654 (9th Cir. 2017). The ALJ must support his or her decision to reject the  
2 uncontradicted treating physician's opinion with "clear and convincing reasons that are  
3 supported by substantial evidence." *Id.* (quoting *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d  
4 1194, 1198 (9th Cir. 2008) (alteration in original) (internal citation omitted). To do so, the  
5 ALJ sets out "a detailed and thorough summary of the facts and conflicting clinical  
6 evidence," interprets that evidence, and makes findings. *Revels*, 874 F.3d at 654-55  
7 (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (internal quotation  
8 omitted)).

9 Plaintiff asserts that in upholding the ALJ's reasoning that plaintiff's treatment  
10 regime was conservative, this Court made a clear error of law. Dkt. 15 at 2. Plaintiff  
11 contends that the Court acknowledged plaintiff's treatment regime included plaintiff's  
12 lying down three or four times per day and using an ice pack. *Id.* (citing Dkt. 13, at 10  
13 ("In treating her musculoskeletal impairments, Plaintiff lays down...")). Plaintiff asserts  
14 that these breaks show that treatment was not conservative. Dkt. 15, at 2. Plaintiff also  
15 argues that her use of Vicodin is not conservative treatment. *Id.*

16 Defendant responds that plaintiff's providers had not included such breaks as  
17 part of her treatment plan. Defendant asserts that since plaintiff's symptom reports had  
18 been properly discounted, the ALJ had properly excluded plaintiff's self-directed  
19 symptom management from consideration. Dkt. 16, at 2.

20 The record indicates that plaintiff's providers instructed plaintiff in the use of ice  
21 for her lower back pain. AR 563. Although plaintiff's providers had also prescribed  
22 Vicodin for pain management, plaintiff was encouraged to continue her regime of over-  
23 the-counter pain medication and ice (which plaintiff reported requiring four times daily).

1 AR 567. The Court finds that plaintiff's use of ice and rest was therefore not merely her  
2 response to alleged symptoms of pain, but a part of plaintiff's provider-approved  
3 treatment plan.

4 The use of ice packs and brief periods of bed rest may be classified as  
5 "conservative" treatment. *See, e.g., Julie S. v. Saul*, 2019 U.S. Dist. LEXIS 132145, \*10,  
6 2019 WL 3577671 (E.D. Wa. August 6, 2019) (prescriptions of ice, anti-inflammatory  
7 medication, physical therapy, and possible injections constituted conservative treatment  
8 providing relief to claimant). Yet the frequency and length of plaintiff's rest periods  
9 throughout the day indicate that plaintiff's treatment had not provided sufficient relief of  
10 her condition. The conservative nature of treatment can serve as a specific, legitimate  
11 reason for discounting a medical opinion when it *successfully relieves* symptoms. *See*  
12 20 C.F.R. § 404.1529(c)(3)(iv) (evaluating the *effectiveness* of medication and treatment  
13 and not whether treatment is aggressive or conservative).

14 Accordingly, this Court's Order Affirming Defendant's Decision to Deny Benefits  
15 (Dkt. 13) contains a clear error of law because it failed to show the ALJ had used a  
16 specific and legitimate reason to reject the opinion of an examining physician. *See*  
17 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

18 The Court declined to examine the ALJ's other reasons for rejecting Dr. Gritzka's  
19 opinion on the basis of harmless error. Yet since none of the ALJ's reasons are specific  
20 and legitimate, the ALJ's error was in fact harmful and requires reversal. The ALJ's  
21 second reason to reject Dr. Gritzka's opinion stemmed from a purported inconsistency  
22 with plaintiff's functioning – specifically, plaintiff's reported ability to prepare meals, drive  
23 twice a week to chiropractor appointments and twice a week for grocery shopping, and  
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1 do light household cleaning. AR 22, citing AR 45-47, 68, 74-75. With respect to  
2 plaintiff's ability to prepare meals and do chores, she testified that her husband cooks  
3 their meals and does most household tasks, while she is limited to folding clean laundry  
4 and dusting. AR 68-69, 74-75.

5 Plaintiff also testified that she could drive for 20-30 minutes at a time before  
6 needing to rest and stretch her back, and that her husband is responsible for the bulk of  
7 the grocery shopping. AR 69. None of these activities are inconsistent with Dr. Gritzka's  
8 opinion that plaintiff could not sit for longer than 30 minutes or stand for longer than 10  
9 minutes at a time. These activities do not conflict with Dr. Gritzka's findings that plaintiff  
10 lacked mobility and strength in her arms and legs, or that plaintiff had limited ability to  
11 handle and finger beyond 1/3 of an 8-hour workday. Plaintiff's activities therefore do not  
12 comprise a specific and legitimate reason to reject Dr. Gritzka's opinion. See *Garrison v.*  
13 *Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014).

14 The ALJ's third reason, that Dr. Gritzka's opinion was internally inconsistent,  
15 relies on a misreading of Dr. Gritzka's findings. The ALJ purports to find inconsistency  
16 between plaintiff's limited range of shoulder motion during examination and plaintiff's  
17 subsequent display of greater mobility. AR 22. Yet Dr. Gritzka's note explains that the  
18 additional mobility was due to plaintiff's "trick" use of a range of motion not tested by the  
19 examination. AR 582, 584 (Dr. Gritzka's examination measured plaintiff's range of  
20 motion using extension, flexion, and abduction, while plaintiff demonstrated that she  
21 could achieve an overhead reach through an unusual application of shoulder adduction,  
22 a movement common to those with painful shoulders). This does not indicate  
23 inconsistency with plaintiff's reduced capacity to move her shoulders appropriately for  
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1 light or sedentary work, and this too does not constitute a specific and legitimate reason  
2 to reject Dr. Gritzka's opinion.

3 Finally, the ALJ doubted the objectivity of Dr. Gritzka's position, because "this  
4 opinion appears to be based on an evaluation that was done at the request of the  
5 claimant for the purposes of her disability application process." AR 22. The ALJ does  
6 not refer to any evidence that Dr. Gritzka's report lacked objectivity. A suspicion that  
7 plaintiff's motivation to prove disability drove her to receive an evaluation is not a reason  
8 to reject the findings of that evaluation. See *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir.  
9 1995) ("[t]he purpose for which medical reports are obtained does not provide a  
10 legitimate basis for rejecting them"). It is error for an ALJ to assign bias to a medical  
11 opinion where there is no evidence in the record suggesting that a physician lacks  
12 objectivity. *Reddick v. Chater*, 157 F.3d 715, 726-727 (9th Cir. 1998) (citing *Magallanes*  
13 *v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

14 The ALJ failed to provide a specific or legitimate reason to reject Dr. Gritzka's  
15 opinion, and this error is not harmless. Dr. Gritzka opined that plaintiff would need to lie  
16 down for a minimum of one hour during the workday. AR 585. Dr. Gritzka also stated  
17 that plaintiff could not reach overhead in a work setting and would be able to handle and  
18 finger on an occasional basis bilaterally. *Id.* Dr. Gritzka stated that if plaintiff had  
19 attempted to perform even sedentary work after her amended onset date, she would  
20 have been absent from work three days per month or more due to her impairments. AR  
21 585-86.

22 If plaintiff were limited to lying down for a minimum of an hour over the course of  
23 the workday, avoiding any work above her shoulders, manipulating her wrists and  
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1 hands on an occasional (1-3 hours) basis, or missing three days of work per month, it  
2 follows that the ALJ may include additional limitations in the RFC. See AR 19 (The ALJ  
3 determined that plaintiff has the RFC to perform sedentary work if the work allows a  
4 sit/stand alternative); 20 C.F.R. §§ 404.1567(b), 416.967(b). Accordingly, the ALJ's  
5 error with respect to Dr. Gritzka's is not harmless and requires reversal. *Stout v.*  
6 *Commissioner*, 454 F.3d 1050, 1055 (9th Cir. 2006) (an error is harmless if it is not  
7 prejudicial to the claimant or inconsequential to the ALJ's ultimate nondisability  
8 determination).

9 REMAND FOR FURTHER ADMINISTRATIVE PROCEEDINGS

10 Plaintiff argues that this case should be remanded for an award of benefits, or in  
11 the alternative, remanded for further administrative proceedings. Dkt. 13 at 2. "The  
12 decision whether to remand a case for additional evidence, or simply to award  
13 benefits[,] is within the discretion of the court." *Trevizo v. Berry hill*, 871 F.3d 664, 682  
14 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If an  
15 ALJ makes an error and there is uncertainty and ambiguity in the record, the district  
16 court should remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d  
17 1041, 1045 (9th Cir. 2017) (amended January 25, 2018) (quoting *Treichler v. Comm'r of*  
18 *Social Sec. Admin.*, 775 F.3d 1090, (9th Cir. 2014). If the district court concludes that  
19 additional proceedings can remedy the errors that occurred in the original hearing, the  
20 case should be remanded for further consideration. *Revels*, 874 F.3d at 668.

21 The Ninth Circuit has developed a three-step analysis for determining when to  
22 remand for a direct award of benefits. Such remand is generally proper only

23 where "(1) the record has been fully developed and further administrative  
24 proceedings would serve no useful purpose; (2) the ALJ has failed to  
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1 provide legally sufficient reasons for rejecting evidence, whether claimant  
2 testimony or medical opinion; and (3) if the improperly discredited evidence  
3 were credited as true, the ALJ would be required to find the claimant  
4 disabled on remand.”

5 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.  
6 2014)).

7 The Ninth Circuit emphasized in *Leon v. Berryhill* that even when each element is  
8 satisfied, the district court still has discretion to remand for further proceedings or for  
9 award of benefits. 80 F.3d 1041, 1045 (9th Cir. 2017).

10 Here, it cannot be said that a remand for additional proceedings would serve no  
11 useful purpose. As discussed above, the ALJ failed to provide legally sufficient reasons  
12 for discounting Dr. Gritzka’s opinions. Issues remain regarding the evidence in the  
13 record concerning plaintiff’s functional limitations, and therefore serious doubt remains  
14 as to whether plaintiff is in fact disabled. Accordingly, remand for further consideration  
15 of those issues is warranted. Specifically, on remand the Commissioner shall re-  
16 evaluate Dr. Gritzka’s opinion and make a *de novo* determination regarding plaintiff’s  
17 entitlement to benefits. This re-assessment should include obtaining a medical opinion  
18 concerning pain management for plaintiff’s conditions and obtaining additional  
19 vocational testimony relevant to plaintiff’s limitations to assess plaintiff’s ability to  
20 perform other jobs existing in significant numbers in the national economy.

## 21 CONCLUSION

22 Accordingly, the plaintiff’s motion to alter or amend judgment (Dkt. 15) is granted.  
23 The Court’s Order Affirming Defendant’s Decision to Deny Benefits dated May 31, 2018  
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1 (Dkt. 13) is amended to the extent it is inconsistent with this decision and to reflect that  
2 the ALJ erred in assigning little weight to Dr. Gritzka's opinion and supplemented with  
3 respect to the Court's determination to remand this case for further administrative  
4 proceedings. An amended judgment shall be entered for plaintiff and the file shall be  
5 closed.

6 Dated this 22nd day of September, 2020.

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Theresa L. Fricke  
United States Magistrate Judge  
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